MISCELLANY.

UNANIMITY OF THE JURY.—Judge A. B. Grace, of Pine Bluff, Arkansas, has expressed his disapproval of the requirements of unanimity for juries in somewhat racy style: "In every relation of life in America, where the result is made to depend on the opinions and decisions of a number of persons, the principle of majority rule has been adopted, with the sole exception of the verdict of a jury. A majority of one vote in each house of a general assembly or the Congress, suffices to create, repeal, or change a positive law, regardless of the magnitude of the interests involved, as in the case of a currency bill, a tariff law, or a declaration of war. A majority in the national senate ratifies or refuses to consent to a treaty with a foreign power. A majority of a single vote in half a million in a pivotal State may elect a President of the United States, change the entire policy of the government, and bring prosperity or ruin to seventy millions of people. And yet lawyers—good lawyers, honest and patriotic lawyers—will roll their eyes in horror at the very suggestion that it would be sensible to apply the same principle in deciding a replevin suit for a 'ticky' calf or a pestle-tailed pony. And yet, again, this very calf or pony case, when it has ascended by appeal from the justice of the peace to circuit court and thence to the Supreme Court of the State, is decided by a bare majority of the judges, if they should happen to differ. In a capital case, if three supreme judges vote to break the appellant's neck and two decide that he ought to go scot-free, the accused gentleman must suffer the inconvenience of being hanged until he is dead. So the Supreme Court of the United States, if five learned gentlemen are of the opinion that an income tax, for instance, is unconstitutional and four other equally 'potent, grave, and reverend seigniors' think that it is not, the majority of one prevails and the solemn act of the Senate and House of Representatives of the United States becomes a nullity. So, again, in bodies having purely ministerial or executive functions, as in case of boards of directors of corporations, for example, the majority rules and the rights of the minority must give way to the will of the majority when lawfully expressed."—*Law Notes.*

MUNICIPAL LIABILITY FOR THE TORTS OF FIRE-BOATS. — After a reargument ordered in the spring of 1899, the case of *Workman* v. *New York* has finally been decided by the Supreme Court of the United States, the court being as nearly as possible evenly divided. 21 Sup. Ct. Rep. 212. The single question at issue was whether the city of New York was liable, in a proceeding in admiralty *in personam*, for an injury to another vessel caused by the negligence of those in charge of a city fire-boat on her way to a fire. The fire-boat was trying to reach a fire at the head of the slip next to pier 48, East River, and through mismanagement in entering the slip struck the barkentine, Linda Park, moored at the outer end of the pier. The decision reached is that the city was liable, and the applicability is denied in admiralty of that common-law rule which regards the service of a fire department as of a governmental nature, such as to exempt cities from liability for the negligent acts of its servants engaged in this service. The reason

given by Mr. Justice White, in the majority opinion, for not applying the common-law doctrine is "that in the maritime law the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." This may be admitted; but Mr. Justice Gray and the dissenting judges seem to be right in showing that this is not conclusive. All that can be meant by the remark quoted, if it is a true summary of the authorities, is that the owner of a private vessel is not exempt from liability because she was engaged at the moment of her wrongdoing in the useful occupation of putting out fires and the like. *The Blackwall*, 10 Wall. 1; *The Clarita and The Clara*, 23 Wall. 1. These decisions do not touch the question of the rule of *respondeat superior* in regard to governmental agents of municipal corporations. Why should not that rule be applied in admiralty? The personal liability of the owner of an offending vessel, based upon his ownership, is not different from the responsibility under the rule of agency based upon the relation of master and servant. This is admitted by Mr. Justice White. If, then, the court of admiralty is enforcing the general law of agency, it is not easy to see how that court can consent to apply part of that law and yet refuse to apply the whole of it. The fire-boat personified was the servant of the city as well as were the fire-men; the liability of the city for their negligence should not vary according as the plaintiff chose a court of common law or a court of admiralty.

One other point should not pass unnoticed. In the last paragraph of the majority opinion the court carefully guards itself from admitting the general rule of common law which exempts a city from responsibility for the torts of its fire department. In the courts of the States, however, from Massachusetts to Washington, *Hafford* v. *New Bedford*, 16 Gray, 297; *Lawson* v. *Seattle*, 6 Wash. 184, this rule is fixed, if there is anything fixed in the law of municipal corporations. The doubt suggested by the court must be deemed unfortunate because of the unsettling effect which it must have upon actions brought in the federal courts. It also raises a grave question whether this matter is not one of local law, in which the law of the respective States should be followed by the federal courts. If it is not, the circuit judges are left in an unenviable position.—*Harvard Law Review.*

INSURANCE—FORFEITURE OF POLICY FOR BREACH OF ALIENATION CLAUSE. —The case of *Skinner* v. *Houghton* (Md.), 48 Atl. 85, involved the question of what shall constitute a change of interest under the alienation clause of the standard fire policy. It is a square decision against what a recent writer has declared to be the rule understood and acted upon by the insurance companies and the legal profession generally. Richards on Insurance (1898), sec. 147. Under the old form of policy, collected with decisions in May on Insurance (4th ed. 1900), at pp. 575–9, providing against any "change in title or possession," the decisions were uniform that a contract to sell unaccompanied by change of possession was not such a change as to work a forfeiture. May, *supra*, sec. 267; Joyce on Insurance (1897), sec. 2284. But the language of the standard policy is broader, covering every "change in interest, title or possession." This was clearly intended to mean every insurable "interest," equitable as well as legal, but a doubt arises owing to the tendency of the courts to construe the policy most

strongly against the insurance companies. Apparently there is very little authority on the subject.

In *Erb* v. *German-Amer. Ins. Co.*, 67 N. W. 583 (Iowa, 1896)—standard policy—there was an agreement to exchange the insured property for land not later than a given date, but the agreement was never executed. It was held there had been no change of possession or right of use, but merely an agreement to make a change in the future, and consequently no change of interest within the meaning of the policy. *Ins. Co.* v. *Wilson*, 55 S. W. 935 (Ark., 1900), was a contract to sell, but no payment had been made and the vendor was still in possession. The provision was that the "policy should be void if the interest of the assured became other than the entire ownership." The court in a *dictum* assuming "interest" to mean something different from "title," held there had been no breach. On the other hand, in *Gibb* v. *Phila. Fire Ins. Co.*, 59 Minn. 267 (1894)—standard policy—the court said, "the word 'interest' is broader than the word 'title,' and includes both legal and equitable rights." The vendee here, however, had entered into possession under the contract, though the court added, "it is not necessary to consider the question of the change of possession except in so far as it 'strengthens' the interest acquired by the vendee." Finally, in *Germond* v. *Home Ins. Co.*, 2 Hun. 540 (1874), a contract of sale and part payment of the purchase money was held to work a forfeiture under a clause worded "if the interest of the parties therein shall be changed." Probably there was no change of possession, though the fact is not stated in the record. *Cf.* also *Western Mass. Ins. Co.* v. *Riker*, 10 Mich. 279 (1862); *Edmunds* v. *Ins. Co.*, 1 Allen, 311 (1861); *Abbott* v. *Hampden Ins. Co.*, 30 Me. 414 (1849).

The present case would seem to be the first square decision as to the effect of such a contract under the standard policy, and on principle it is submitted the reasoning of the court is unanswerable. The vendee had an insurable interest in the property and one which he could enforce by specific performance. Conversely, in most jurisdictions, the vendor was entitled to the full purchase price even after the destruction of the property (1 Columbia Law Review, 1–10). Hence, it could not well be said that there was no increase of risk, and that the vendor any longer had that "unconditional and sole ownership" stipulated for in another part of the policy. Under this latter clause a vendee in possession with an equitable right to the whole title unencumbered has been held the unconditional and sole owner; while though the insured be invested with the legal title, if the equitable estate and the right to the legal estate are in another, the policy is voided unless the fact is stated. See *Richards*, *supra*, sec. 143, and cases cited. The decision in the main case seems only to carry out this reasoning to its logical conclusion; and the same should be held, even though no part of the purchase price had yet been paid, as the vendee until default has a good equitable interest. —*Columbia Law Review.*

AN ELEVATOR NOT A COMMON CARRIER.—The New York Court of Appeals has recently decided that a passenger-elevator is not to be regarded as a common carrier. The question was unique and the decision of it important; for hitherto the tendency in that State has been to the contrary view; and, indeed, it was only by the heroic measure of overruling the Supreme Court of the State, and repudiating some of its own *dicta*, that the Court of Appeals has set the matter at rest.

It happened that a gentleman by the name of Griffin was descending in an elevator from the eighth floor to the first, when the car escaped control, fell through the shaft, struck the buffers and rebounded. At almost the same moment the balance-weights, which had meanwhile got detached, came crashing through the roof of the car, struck the passenger and inflicted instant death. In seeking to recover damages from the owner of the building, Mrs. Griffin, administratrix, put in evidence at the trial substantially nothing but this story, alleging negligence but proving none; and the question thus arose whether proof was necessary.

Now with common-carriers of passengers the law is very exacting. Of them it requires not merely that reasonable care which, in most walks of life, furnishes the test of legal liability, but it holds them to the utmost zeal of vigilance in throwing safeguards about their patrons. Their undertaking is "to carry with safety as far as human care and foresight can go." (*Taylor* v. *Grand Trunk R. R.*, 48 N. H.) And in all such appliances as relate to the motive power and control of the vehicle, in distinction from mere accessory matters, like means of exit, they must keep abreast of the times and avail themselves of the newest and the best. (*Meier* v. *Penn. R. R.*, 64 Pa. St.) So, for all defects of such a nature that the consequences may be terrible, not only negligence, but even trifling negligence lays them open to claims for damages. In a suit against a carrier, therefore, the burden rests upon himself to explain away the accident; and, until he does that, the plaintiff need do no more than show his injury to be the result of the accident—such an accident as would not naturally occur in the absence of at least some degree of negligence. Upon proof of so much, a rebuttable presumption arises in favor of the plaintiff. (*Griffin* v. *Manice* and cases cited, *post.*)

All this is old law. In the case of Mr. Griffin, therefore, it only remained to establish its applicability to those who operate elevators; and this is what the trial-judge attempted in his charge, of which the following is a part: "As to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and he is, in that respect, subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery." This charge was approved by the Appellate Division. (*Griffin* v. *Manice*, 47 Appel. Div. Sup. Court, N. Y.) Indeed, except for a change of mood, from the subjunctive to the indicative, it was taken *verbatim* from an opinion of the Court of Appeals itself. For in the case of *McGrill* v. *Buffalo Office Company* (153 N. Y.), that Court had said in these very terms that such *might* be the rule; sparing the defendant in that case, however, because the defect there alleged had no bearing on the motive power or control of the elevator, but pertained only to the means of exit. But when this, its own, though non-committal language, was served up to it with approval by the Appellate division of the Supreme Court, the Court of Appeals replied (speaking through Judge Cullen): "I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care. The stairways are always open to those who deem this degree of diligence inadequate for their protection." From this view two judges dissented.

This entire question is one of public policy. (*Taylor* v. *Grand Trunk*, *supra.*) The business of carrying passengers by rail is of such extraordinary hazard, that for a wholesome stimulus to care and diligence, it is coupled with extraordinary

liability. And before New York found these considerations inapplicable to elevators, California had arrived at the opposite conclusion. Said the Supreme Court of that State: "Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put in hazard." (*Treadwell* v. *Whittier*, 80 Cal.)

Here is a flat-footed difference. Where New York denies that the elevator-man receives, like the common-carrier, any consideration for his services, California calls attention to the advantage which accrues to his business. Where New York calls attention to the stairway, California denies the use, in a sky-scraper, of this contrivance, to the aged and infirm; and might have added, had the New York opinion been extant at the time, that the turnpike should make as good a defense for the common-carrier as the stairway for the elevator-man. It is curious to note that the conservative court is old and Eastern, and the radical, young and Western. And since the question at issue is one of policy—that is, of expediency—for the solution of which common sense is as efficient as judicial training, it will not be strange if the States divide upon it, perhaps East and West.—*Yale Law Journal.*

RECENT LEGISLATION IN VIRGINIA.—The following outline of the work of the Virginia legislature at its extra session, 1901, will serve to put busy practitioners on notice of important changes in the statute law of the State. The figures in parenthesis refer to pages in the official volume. It may prove interesting to those statesmen who contemplate membership in the approaching constitutional convention, to learn that of three hundred and fifty acts and joint resolutions passed, something like three hundred and twenty-five were private or local bills. The idea seems fast taking root in Virginia that members of the legislature represent, not the people of the whole State, but the particular local constituency electing them—with the right of each member to have the general laws altered to fit the local wants of his district. Save where local conditions are peculiar, the law should be the same throughout the commonwealth. The first act noted below strikingly illustrates this vicious custom—the general law requiring clerks' offices to be kept open every day except Sundays, having a *proviso* attached, by which the clerks' offices of two specified counties are required to be closed on all legal holidays. If it is wise to require these two or three offices to be closed on legal holidays, the same reason demands that the requirement extend to every clerk's office in the State. If it would be unwise to close every clerk's office in the State on every legal holiday, then it is equally impolitic to deny the citizens of the counties named access to their clerks' offices on those days.

Another and more flagrant violation of the principle of uniformity in our domestic legislation occurs in the second act mentioned below, where the general principles regulating actions against municipal corporations for negligence, are materially altered in the interest of a single corporation, the city of Lynchburg. These two specimens at least indicate that the counties of Norfolk and Shenandoah and the city of Lynchburg have representatives keenly alive to local interests. But this is not *states*manship. What shall we call it—*county*-manship?

Clerks' Offices.—(1) Amending Code, sec. 3179—requiring clerks' offices to be kept open every day but Sunday, during convenient business hours—but *requiring*

(not merely permitting) clerks' offices in the county of Norfolk and city of Portsmouth to be closed on all days declared by the general assembly to be legal holidays (p. 94).

(2) Amending the foregoing amendment by extending it to Shenandoah county (p. 361).

It seems clear, from the language, that any proceeding in the clerks' offices mentioned in the saving clause, if taken or had on a legal holiday, would be absolutely void—just as if done on Sunday—legal holidays being thus made *dies non juridici*. See *Lee* v. *Willis*, 6 Va. Law Reg. 691.

Action for Negligence Against City of Lynchburg.—Requiring, in actions for negligence, that if any person or corporation be liable along with the city, such person or corporation shall be joined as defendant—and if both the city and its co-defendant be found guilty, it shall be ascertained by the "court or jury" which defendant is primarily liable. If the co-defendant be primarily liable, execution shall be stayed against the city until execution is returned unsatisfied against the co-defendant. See the act for various other provisions for the benefit of the city in such cases (p. 107).

This is not general legislation, but is mentioned here as an illustration of the impolitic legislation before referred to.

Conferring on Courts of Equity Jurisdiction to Enforce Lien for Taxes.—Amending Code, sec. 456, by the provision that the lien for taxes on real estate, "in addition to existing remedies, and shall be enforceable by suit in equity" (p. 148).

The purpose and effect of this statute is to overturn the ruling of the Virginia Court of Appeals in *Marye* v. *Diggs*, 6 Va. Law Reg. 618, denying to courts of equity jurisdiction to protect or enforce the lien of the Commonwealth for taxes. The amendment seems eminently wise.

Amending Separate Car Act.—Amending Act of January 30, 1900, popularly known as the "Jim Crow Car Act" (Acts 1899-00, p. 236), by the proviso that the act shall not apply to officers in charge of prisoners, whether the prisoners are white or colored, or both, nor to the prisoners in his custody (p. 183).

Authorizing Judges to Sign Bills of Exception in Vacation.—Amending Code, section 3385, by the provision that "any bill of exceptions may be tendered the judge and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon" . . . (p. 186).

The effect of this amendment is to overturn the decision in *Va. Development Co.* v. *Rich Patch Iron Co.*, 6 Va. Law Reg. 549, that bills of exception could not be signed in vacation, even by consent of parties.

Validating Deeds of Married Women.—Act declaring that conveyances heretofore made under powers of attorney from a married woman, shall be as valid as if executed by her in conjunction with her husband (p. 198).

Fees on Corporate Charters.—Amending previous statute on this subject (p. 232).

Garnishment of Public Officials.—Amending Act of February 12, 1898—the new act providing that "All officers, clerks and employees who hold their office by

virtue of authority from the General Assembly of Virginia, or by virtue of city, town or county authority, whether by election or appointment, and who receive compensation for their services from the moneys of such city, town or county, shall, for the purposes of garnishment, be deemed to be and are officers, clerks or employees of such city, town or county" (p. 252).

See *Portsmouth Gas Co.* v. *Sanford*, 5 Va. Law. Reg. 172, and note.

Call for Constitutional Convention—(p. 262).

Appellate Procedure—Bills of Exception.—Act providing that "Any evidence in the record may be considered by the appellate courts, if certified in any bill of exception, as though certified in each" (p. 286).

The object of this statute is to obviate the anomalous but well settled rule of appellate practice in Virginia, forbidding reference from one bill of exceptions to another, unless special reference be made to the latter on the face of the former. See *Brooke* v. *Young*, 3 Rand. 106; 4 Minor's Inst. (3d ed.) 1098.

Winding Up Insolvent or Unprofitable Corporations.—Providing that when principal purpose of a mining or manufacturing company, or a land and improvement company, or a mercantile or commercial company, incorporated in this State, has failed, or the officers have abandoned it, or it has become insolvent, or its assets are being consumed in expenses, without benefit, or probable benefit to the shareholders, etc., etc., a chancery court may wind up its affairs at the suit of shareholders holding one-tenth of the capital stock (p. 326).

The purpose of this Act is to confer upon the minority of shareholders a right to institute proceedings for winding up, under the circumstances mentioned in the act—a right which they seem not to possess in the absence of statute. See 5 Thompson on Corp. 6692-6698.

Separate accommodation for whites and negroes on steamboats—(p. 329).

Regulating Examinations for Admission to the Bar.—Amending Code, sec. 3191, as amended by Act of January 11, 1896, by providing that "said regulations shall not deprive an unsuccessful applicant at a prior examination from taking the next succeeding examination" (p. 346).

How far the courts must submit to legislative control in the matter of admission to the bar, is a difficult question. See *In Re Day* (Ill.), 54 N. E. 646; 5 Va. Law Reg. 337.

Release of Recorded Liens.—Amending Code, sec. 2498, as amended by Acts 1899-1900, p. 839, by extending its provisions to personal property (p. 348).

Prohibiting expectoration on floors of churches—(p. 366).